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No. 75-1667

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

PETER POMPONIO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT H. BORK,
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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A–5A) is reported at 528 F.2d 247.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 6A) was entered on December 16, 1975, and a petition for rehearing, with suggestion for rehearing *en banc*, was denied on March 17, 1976 (App. C, *infra*,

p. 7A). On April 15, 1976, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including May 16, 1976 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in a prosecution for willful filing of false income tax returns in violation of 26 U.S.C. 7206(1), the jury must be instructed that "bad purpose or evil motive" is an element of the offense and that "good motive" negates the element of willfulness necessary to support a conviction.

2. Whether the trial court adequately instructed the jury that it was required to consider whether respondents believed in good faith that certain corporate cash advances paid to them were loans and that certain losses claimed on their tax returns belonged to their partnership and not to a corporation.

STATUTE INVOLVED

Section 7206(1) of the Internal Revenue Code of 1954, 26 U.S.C. 7206(1), provides:

> Any person who—
>
> (1) * * * Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter * * *
>
> * * * * *

> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, respondents Peter Pomponio, Paul Pomponio, and Charles J. Piluso were convicted on three counts of willfully making and subscribing false income tax returns for the years 1969 through 1971, in violation of 26 U.S.C. 7206(1) (App. A, *infra*, p. 2A). The evidence established that respondents had collectively understated their taxable income by approximately two and one-half million dollars with respect to those years (Tr. 594–603).[1] Respondents were each sentenced to concurrent three-year prison terms, and a $5,000 fine, on each count (R.A. 101–102; R. 157).[2] The court of appeals held that the trial court's instructions to the jury were erroneous in two separate respects. It reversed the convictions and remanded the case for a new trial (App. A, *infra*, pp. 1A–5A).

1. Respondents Peter and Paul Pomponio are brothers who were business associates involved in the development, construction, and operation of high-rise office and apartment buildings in the District of Columbia and Northern Virginia. Respondent Charles J.

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[1] "Tr." refers to the transcript of trial proceedings.

[2] "R.A." refers to the combined appendix filed in the court of appeals on behalf of all the respondents; "R." refers to the appendix filed on behalf of respondent Piluso.

Piluso was their attorney (App. A, *infra*, p. 2A). The income tax fraud with which respondents were charged was based upon two allegations: (1) that respondents had improperly treated amounts paid to them by various corporations that they owned or controlled as loans whereas in fact respondents knew them to be taxable dividends; (2) that respondents had improperly deducted certain losses as partnership losses even though they knew that the losses had in fact been incurred not by their partnership but by a corporation (App. A, *infra*, pp. 2A–3A). At trial, respondents took the position that the amounts paid to them by their corporations were not taxable income but loans that they intended to repay at some future date, and that the losses that they had deducted were properly attributable to their partnership (Tr. 976–993, 1018–1039).

2. At the conclusion of the trial, the district court defined the statutory element of willfulness for the jury as follows:[3]

> An act or a failure to act is willfully done if done voluntarily and intentionally and with the specific intent to do something which the law forbids, that is to say with bad purpose either to disobey or to disregard the law.
>
> The Supreme Court has formulated the requirement of willfulness as used in this identical statute as bad faith or evil intent or evil

[3] The district court's instructions are more fully set forth at Appendix D, *infra*, pp. 8A–12A.

> motive and want of justification in view of all the financial circumstances of the taxpayer or knowledge that the taxpayer should have reported more income than he did. [Tr. 1097.]
>
> * * * * *
>
> Good motive alone is never a defense where the act done or omitted is a crime. So the motive of the accused is immaterial except insofar as evidence of motive may aid determination of state of mind or intent. [Tr. 1124.]

With respect to the question whether respondents willfully claimed partnership loss deductions that they knew belonged to a corporation, the trial court instructed the jury as follows:

> [F]rom other evidence the Government has shown you that the Virginia Corporation was the record holder of this property, title holder, that they are the ones who had obtained the loan and that they were the ones who were obligated to pay the interest and the loan, that is the corporation, and from this the Government says, first, there never was any partnership in being.
>
> They don't deny, they admit that these four gentlemen were partners, these three gentlemen and Mr. Ginsberg were partners, they don't question that, under the agreement.
>
> They claim that legally and factually this partnership never came into being due to this situation I have just related, the inability to execute it by transferring the property and designating the nominee and proof of this conveyance.

> And, further, the Government says even though it had of [*sic*] been a legitimate transfer of corporate assets to the partnership entity, that it didn't include the losses prior to the creation of the partnership; it could only include losses, if any, that occurred after the partnership came into existence, and, as I say, it never came into existence legally for that reason.
>
> And they claim that these officers, who are the ones—these defendants, who are the ones who put up the Virginia stock as collateral security in escrow, they knew that because they are the ones who put it up, and, therefore, they knew that they couldn't transfer this asset to a partnership, and, therefore, when they couldn't transfer it they couldn't take the benefits of any losses sustained by the partnership in question, and, therefore, they couldn't claim this as a deduction, thereby reducing their gross income for the year in question because by so doing they would know that they were filing a false report of their total gross income.
>
> Now, although, again I want to remind you you are not called upon to pass upon the legality of these various alleged transactions pertaining to this, you are the sole judges of the fact as to whether or not that claimed loss was permitted to be taken by the individuals and thereby reducing their reportable gross income for the year in question and whether they knew it. [Tr. 1115–1117.]

3. The court of appeals reversed and remanded the case for a new trial because it concluded that the trial court's instructions to the jury were erroneous in two respects (App. A, *infra,* pp. 1A–5A). First, the court held that the trial court's charge dealing with respondents' motives (to which respondents took no exception) was improper in the light of this Court's decision in *United States* v. *Bishop,* 412 U.S. 346. The specific portion of the trial court's instructions that the court of appeals identified as error was the trial court's statement to the jury that (Tr. 1124):

> Good motive alone is never a defense where the act done or omitted is a crime. So the motive of the accused is immaterial except insofar as evidence of motive may aid determination of state of mind or intent.

Although the court of appeals acknowledged that this instruction "would have been correct in most criminal trials" (App. A, *infra*, p. 5A), it held that this Court in *Bishop* had indicated "that the statute at hand requires a finding of a bad purpose or evil motive." The court of appeals reasoned that because *Bishop* requires that the good faith of the defendant be considered by the jury in determining whether or not the act charged was done willfully, "excluding good motive from the consideration of the jury in a case for violation of 26 U.S.C. § 7206(1) is inconsistent with *Bishop*" (*ibid.*).

The court of appeals also held that since there was evidence that may have tended to show that respondents might have believed that the funds received from the corporations were loans and that the losses

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which they deducted on their personal income tax returns were partnership losses, the trial court should have instructed the jury that a good faith belief would negate the element of willfulness necessary to support a conviction (App. A, *infra*, p. 5A).

REASONS FOR GRANTING THE WRIT

In holding that a conviction for willfully filing a false tax return in violation of 26 U.S.C. 7206(1) requires a finding of "bad purpose or evil motive," the decision of the court of appeals conflicts with *United States* v. *Hawk,* 497 F.2d 365 (C.A. 9), certiorari denied, 419 U.S. 838; *United States* v. *McCorkle,* 511 F.2d 482 (C.A. 7) (*enbanc*), certiorari denied, 423 U.S. 826; and *United States* v. *Pohlman,* 522 F.2d 974 (C.A. 8) (*en banc*), certiorari denied, January 12, 1976, No. 75—483.

This Court in *United States* v. *Bishop,* 412 U.S. 346, held that the element of willfulness is the same in all federal tax offenses, whether felonies or misdemeanors. In so holding, the Court observed that "the word 'willfully' in these [criminal tax] statutes generally connotes a voluntary, intentional violation of a known legal duty" (*id.* at 360). Following the decision in *Bishop*, three courts of appeals have concluded that the government, in prosecuting federal tax offenses, need not prove bad purpose or evil motive in order to establish the element of willfulness. *United States* v. *Hawk, supra; United States* v. *McCorkle, supra;*

United States v. *Pohlman, supra.* It is sufficient in those circuits that the prosecution prove that the proscribed act or omission was committed voluntarily and intentionally, with knowledge of its illegality.

The decision below departs from what had come to be regarded as the settled meaning of the term "willfully" in federal tax offenses. The court of appeals' holding requires the prosecution to prove not only that the defendant voluntarily and intentionally violated a known legal duty but also that he did so with a bad purpose or evil motive beyond that which is already implicit in intentional wrongdoing. Since willfulness is an element of every federal tax offense (see 26 U.S.C. 7201–7207), the question of the showing necessary to establish that element is of the utmost importance to the criminal enforcement of the federal tax laws.

1. The court of appeals read *Bishop* as requiring "a finding of a bad purpose or evil motive" (App. A, *infra*, p. 5A). But while this Court referred in *Bishop* to the "bad faith or evil intent" formulation of *United States* v. *Murdock*, 290 U.S. 389, it did so in a context that made plain its view that the *Murdock* formula was indistinguishable from that of a voluntary and intentional violation of a known duty (412 U.S. at 360):

> The Court * * * has recognized that the word "willfully" in these statutes generally connotes a voluntary, intentional violation of a known legal duty. It has formulated the re-

> quirement of willfulness as "bad faith or evil intent" * * *, or "evil motive and want of justification in view of all the financial circumstances of the taxpayer" * * *, or knowledge that the taxpayer "should have reported more income than he did." * * *
>
> This longstanding interpretation of the purpose of the recurring word "willfully" promotes coherence in the group of tax crimes.

In speaking of a single "longstanding interpretation," the Court made clear that the phrase "bad faith or evil intent," as used in *Murdock,* referred to nothing more than the bad purpose or evil motive that necessarily inheres in a voluntary, intentional violation of a known legal duty. Thus, nothing more than proof of intentional wrongdoing is required. See *United States* v. *Hawk, supra,* 497, F.2d at 368; *United States* v. *McCorkle, supra,* 511 F.2d at 485;[4] *United States* v. *Pohlman, supra,* 522 F.2d at 977.[5]

The decision below, however, requires more. Building upon the "bad faith or evil intent" formulation of *Murdock*, the court held that in order to establish willfulness the prosecution must prove that the defendant did not commit the prohibited act or omission out of a "good motive" (App. A, *infra*, p. 5a). But the "bad faith" formulation in *Murdock* did not concern the defendant's motive (*i.e.*, his reasons for acting); it was addressed to his intent or state of mind at the time of the proscribed act (*i.e.*, whether he intentionally and knowingly violated the law).[6] Thus, the court of appeals confused intent, which is at the heart of the concept of willfulness, with motive, which is irrelevant to the traditional criminal standard of willfulness.

Moreover, if, as the court of appeals held, "good motive" were a defense to a criminal tax prosecution, a person who voluntarily and knowingly committed a criminal tax offense might nevertheless avoid conviction by asserting that he acted in order to protest an illegal and immoral war (see *United States* v. *Malinowski,* 472 F.2d 850, 855 (C.A. 3), certiorari denied, 411 U.S. 970); to protest the withholding of

[4] By citing *McCorkle* with a "but see" notation (App. A, *infra*, p. 5a), the court of appeals appears to have recognized that *McCorkle* was in conflict with its decision.

[5] The decision below relied on the panel decision in *Pohlman* (510 F.2d 414) which was reversed by the Eighth Circuit *en banc* (App. A, *infra*, p. 5a). Although the government called the *en banc* decision in *Pohlman* to the attention of the court of appeals in a petition for rehearing, the court of appeals denied the petition (App. C, *infra*, p. 7a).

[6] *Murdock* involved a prosecution for willful failure to supply information requested by the Internal Revenue Service. The Court held that the criminal sanction for such conduct did not apply to one whose refusal to give the requested information had been based upon a bona fide, though mistaken, belief that his refusal was justified by his constitutional protection against self-incrimination. Since the scope of that privilege had been uncertain at the time of the defendant's refusal to supply the information, the Court held that he was entitled to an instruction that the jury should consider whether his conduct was based upon his good faith belief that the privilege was applicable. Thus, if the defendant had such a belief that he was constitutionally protected from complying with the summons, *i.e.*, that if in refusing to comply he was not violating a legal duty, his refusal was not willful.

income tax from the wages of workmen (*United States* v. *Smith,* 487 F.2d 329, 330 (C.A. 9), certiorari denied, 416 U.S. 989); to avoid disclosure of his identity to others (see *United States* v. *Matosky,* 421 F.2d 410, 411 (C.A. 7), certiorari denied, 398 U.S. 904); or to protest a particular government expenditure. However laudable such "motives" might be in particular circumstances, they cannot negate the element of willfulness if the defendant voluntarily and intentionally violated a known legal duty prescribed by the tax statutes.

Thus, after charging the jury that "[a]n act or a failure to act is willfully done if done voluntarily and intentionally and with the specific intent to do something which the law forbids, that is to say with bad purpose either to disobey or to disregard the law" (Tr. 1097), the trial court properly instructed that "[g]ood motive alone is never a defense where the act done or omitted is a crime * * * except insofar as evidence of motive may aid determination of state of mind or intent" (Tr. 1124).

2. The court of appeals further erred in holding that the trial court had failed to instruct the jury that it could not convict if it found that respondents reasonably believed that the corporate cash advances made to them were loans or that their claimed loss deductions were attributable to their partnership (App. A, *infra,* p. 5A). Although this issue would not independently warrant review by this Court, this aspect of the trial court's instructions was an independent ground for reversal by the court of appeals. Thus, if the Court grants certiorari with respect to

the first question, consideration of this second issue will obviate the need for a new trial.

The trial court's charge to the jury gave the very instructions that the court of appeals held that it had failed to give. With respect to the corporate advances, the trial court stated (Tr. 1123):

> Now, next if you do find from the evidence that [the corporate advances] were not loans, next you must go one step further, and I told you if you found they were bona fide loans that ends it, if you do find that they were not bona fide loans then you must next determine whether or not the defendants knew at the time they were withdrawing this money that it was not a loan and that they didn't have any intention to pay it at any definite time or anything.

This instruction was more than sufficient to advise the jury that even if it believed the advances were not loans, it could not convict respondents unless it also determined that the respondents did not in good faith believe the advances to be loans.

Similarly, the trial court's instructions concerning the propriety of respondents' partnership loss deductions adequately advised the jury that it could not convict unless it determined that respondents knew that they were not entitled to take those deductions. The element of knowledge with respect to the partnership losses was included in the following portion of the instructions (Tr. 1116–1117; emphasis supplied):

> And, further the Government says even though it had of [sic] been a legitimate transfer of corporate assets to the partnership entity, that

it didn't include the losses prior to the creation of the partnership * * *.

And [the Government] claim[s] that * * * these defendants * * * *knew that they couldn't transfer this asset to a partnership, and * * * take the benefits of any losses sustained by the partnership in question,* and, therefore, they couldn't claim this as a deduction, thereby reducing their gross income for the year in question because *by so doing they would know that they were filing a false report of their total gross income.*

Now, although, again I want to remind you you are not called upon to pass upon the legality of these various alleged transactions pertaining to this, *you are the sole judges of the fact as to whether or not that claimed loss was permitted to be taken by the individuals* and thereby reducing their reportable gross income for the year in question *and whether they knew it.*

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
MYRON C. BAUM,
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Assistant to the Solicitor General.
ROBERT E. LINDSAY,
RICHARD B. BUHRMAN,
Attorneys.

MAY 1976.

Appendix A

United States Court of Appeals
for the Fourth Circuit

No. 74–1758

UNITED STATES OF AMERICA, APPELLEE

v.

PETER POMPONIO, PAUL POMPONIO, CHARLES J. PILUSO, APPELLANTS

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.

OREN R. LEWIS, *District Judge*

Argued February 6, 1975

Decided December 16, 1975

Before RUSSELL, FIELD, and WIDENER, *Circuit Judges*

ALBERT J. AHERN, Jr., for Appellant CHARLES J. PILUSO; ALAN Y. COLE (LEE A. SCHULTZMAN; COLE and GRONER; STUART E. SEIGEL and COHEN and URETZ on brief) for Appellants PETER POMPONIO AND PAUL POMPONIO; THOMAS K. MOORE, Assistant United States Attorney (DAVID H. HOPKINS, United States

Attorney, and CHARLES E. BROOKHART, Attorney, Tax Division, United States Department of Justice, on brief) for Appellee.

WIDENER, *Circuit Judge:*

Peter, Paul, and Louis Pomponio are brothers who were business associates involved in the development, construction, and operation of high-rise office and apartment buildings in the District of Columbia-Northern Virginia area. Charles Piluso was their attorney. The four were originally indicted on September 24, 1973 on several counts of income tax evasion and conspiracy to commit income tax evasion. This indictment was superseded by another grand jury indictment on November 14, 1973 in which they were each indicted on three counts of filing a false income tax return in violation of 26 U.S.C. § 7206(1) and jointly indicted for conspiracy with others to defraud the United States by impeding the ascertainment and collection of income taxes and withholding taxes by various means in violation of 18 U.S.C. § 371. Due to illness, Louis Pomponio was severed from the case and tried separately. Prior to trial, the United States struck from the conspiracy indictment that portion of it dealing with withholding taxes and several of the means alleged to have been used.

The trial commenced on March 19, 1974. After the jury was empaneled and the government made its opening statement, the court severed Count I, the conspiracy count. The defendants were then tried and each was convicted on three counts of filing a false return. From these convictions they appeal.

The income tax fraud alleged was principally based on two allegations: (1) the various corporations owned or controlled by the defendants would list as loans amounts paid to the defendants, which amounts were actually income taxable to the defendants; (2)

the defendants deducted losses attributed to a partnership which actually did not have the losses to attribute to the partners because such losses were actually those of a corporation.

The defendants allege numerous errors, including several involving the jury instructions. We are of opinion that the court's instruction as to motive was incorrect as used in the case before us, and that it erred in refusing to give a requested instruction on good faith belief of the defendants as to the nature of the loans especially and the deductibility of the partners losses. We express no opinion on the other issues raised, but their very numbers may indicate that many of them are patently without merit.

The offense charged was that the defendants "willfully" made and subscribed income tax returns to be filed with the Internal Revenue Service, which were verified by written declarations made under penalties of perjury, and which the defendants did "not believe to be true and correct as to every material matter," in violation of 26 U.S.C. § 7206(1). The disputed instructions turn on the meaning of the word willfully.

The Supreme Court recently dealt with the meaning of willfully in 26 U.S.C. § 7206. *United States* v. *Bishop,* 412 U.S. 346 (1973), involved a dispute as to whether willfully meant the same in 26 U.S.C. § 7207, a misdemeanor statute, as it did in 26 U.S.C. § 7206, a felony statute. The court held that the meaning was the same in both and went on to clarify and reaffirm its earlier interpretation of willfully as "the bad purpose or evil motive described in *Murdock* [v. *United States,* 290 U.S. 289 (1933)]". *Bishop* at p. 361. See also *Spies* v. *United States,* 317 U.S. 492 (1943).

Murdock involved a willful failure to supply information to the revenue service. The court held that

willful, when used in a criminal statute, ". . . generally means an act done with a bad purpose . . .; without justifiable excuse . . .; stubbornly, obstinately, perversely . . . the word is also employed to characterize a thing done without ground for believing it is lawful . . . or conduct marked by careless disregard whether or not one has the right so to act. . . ." *Murdock* at 394 (Citations omitted). In connection with finding a willful failure to observe the directions of a statute as to furnishing information to the revenue service, the court stated the defendant had a right to have the "absence of evil motive submitted to the jury," *Murdock* at 396, and the jury might acquit if it found the refusal to furnish the information was "not prompted by bad faith or evil intent." The *Murdock* court approved a reversal of a conviction because the defendant was refused a jury charge that they should consider whether the defendant's refusal to supply information was in "good faith and based upon his actual belief" in considering whether the refusal was "willful." See *Murdock,* p. 393, for the form of the instruction.

In the case at hand, the district court gave detailed instructions as to the meanings of intent and motive. Motive was described as "what prompts one person to act or fail to act," while intent "refers only to the state of mind with which the act is done or omitted." The court then went on:

> "Good motive alone is never a defense where the act done or omitted is a crime. So the motive of the accused is immaterial except insofar as evidence of motive may aid determination of state of mind or intent."

In light of *United States* v. *Bishop,* this instruction was improperly used here. Although the instruction was given to explain the difference between intent

and motive, and would have been correct in most criminal trials, the Supreme Court indicated in *Bishop* that the statute at hand requires a finding of a bad purpose or evil motive. Since good faith is required by *Murdock,* as referred to in *Bishop,* to be considered by the jury in determining whether or not the act charged was done willfully, excluding good motive from the consideration of the jury in a case for violation of 26 U.S.C. § 7206(1) is inconsistent with *Bishop.* We note that in a considered *dictum* we have stated that, in a discussion of "willfully" under the same series of statutes, "[i]t is possible that purpose and motivation may be found by a jury to negate willfulness." *United States* v. *Snider,* 502 F.2d 645, 657, (4th Cir. 1974). Accord, *United States* v. *Pohlman,* 510 F.2d 414 (8th Cir. 1975); but see *United States* v. *McCorkle,* 511 F.2d 482 (7th Cir. 1975).

The district court gave full and complete instructions to the effect that the jury could convict only if it found that the defendants had signed the returns knowing them to be false. However, since there was evidence which may have tended to show that the defendants might have believed the payments to be loans, they were entitled to an instruction on that point. *United States* v. *Mitchell,* 495 F.2d 285 (4th Cir. 1974). The same reasoning applies to the claimed losses on account of the partnership. Since a good faith belief would tend to negate the elements of willfulness and knowledge, they were entitled to an instruction similar to that described in *Murdock* v. *United States,* 290 U.S. 389, 393 (1933), and they were entitled to have good motive not excluded from jury consideration.

Reversed and remanded for a new trial.

APPENDIX B

Judgment

United States Court of Appeals for the Fourth Circuit

No. 74-1758

UNITED STATES OF AMERICA, APPELLEE

v.

PETER POMPONIO, PAUL POMPONIO, and CHARLES J. PILUSO, APPELLANTS

Appeal from the United States District Court for the Eastern District of Virginia

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This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia and was argued by counsel.

ON CONSIDERATION WHEREOF It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed and remanded for a new trial. The judgment is reversed, the case is remanded to the United States District Court for the Eastern District of Virginia at Alexandria.

/s/ WILLIAM K. SLATE II,
Clerk.

Filed December 16, 1975

APPENDIX C

United States Court of Appeals for the Fourth Circuit

No. 74-1758

UNITED STATES OF AMERICA, APPELLEE

v.

PETER POMPONIO, PAUL POMPONIO, and CHARLES J. PILUSO, APPELLANTS

Order

No request for a poll of the court having been made, rehearing en banc is denied.

On petition for rehearing, we have had called to our attention that the panel opinion in *United States* v. *Pohlman*, 510 F.2d 414 (8th Cir. 1975), was overturned by an en banc decision, 522 F.2d 974 (8th Cir. 1975), with three judges dissenting from the en banc decision.

We have considered *Pohlman*, the petition for rehearing, and the authorities cited therein, and are of opinion the petition for rehearing is without merit.

It is accordingly *Adjudged* and *Ordered* that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Russell and Judge Field.

/s/ H. EMORY WIDENER, JR.,
For the Court.

A True Copy, Teste:

WILLIAM K. SLATE II,
Clerk,
By E. BELTON, *Deputy Clerk.*

Filed March 17, 1976

APPENDIX D

Excerpts From the Trial Court's Instructions to the Jury:

> The internal revenue laws of the United States further provide that any person who willfully makes and subscribes any return, statement or other document, and here we are referring to the tax return that I just mentioned, which contains or is verified by a written declaration that it is made under the penalties of perjury, which he does not believe to be true and correct as to every material matter therein, shall be punished as the law provides.
>
> Now, you will note from what I have just read, which is an exact reading of the statutory section under which these defendants stand accused, that it refers to the word "false," it uses the word "willfully" make and subscribe, and subscribe merely means to sign it under these penalties, to make means to fill it out or cause it to be filled out, and willfully prescribes that it must be willfully made, willfully subscribed to and the maker does not believe the statement that he has just made and subscribed to be true and correct as to every material.
>
> Now, the word "false," as here used, means, in other words, a statement or a return is false if it was untrue when made and was then known to be untrue by the person making it.
>
> An act or a failure to act is willfully done if done voluntarily and intentionally and with the specific intent to do something which the law forbids, that is to say with bad purpose either to disobey or to disregard the law.
>
> The Supreme Court has formulated the requirement of willfulness as used in this identical statute as bad faith or evil intent or evil motive and want of justification in view of all the financial circumstances of the taxpayer or knowledge that the taxpayer should have reported more income than he did.
>
> An act or omission, a failure to act is knowingly done as that word is used here if done voluntarily and intentionally and not because of a mistake or an accident or from some other innocent reason.
>
> The purpose of adding the word "knowingly" as [*sic*] to insure that no one would be convicted for an act done because of a mistake or because of an accident or from some other innocent reason.
>
> And, as I have heretofore told you, with respect to an offense such as charged in this case, specific intent must be proved beyond a reasonable doubt before there can be a conviction. [Tr. 1096–1098.]

* * * * *

> Now, ladies and gentlemen, if you find, I will tell you now, if you find that these transactions in fact constituted bona fide loan[s] you just don't need to go any further, and that ends it.
>
> To the contrary, as I told you, if you find, taking into consideration all of the evidence, that they were not bona fide loans, then under the law as given to you you may find that they were includable under the gross income. [Tr. 1121.]

* * * * *

> Now, next if you do find from the evidence that they were not loans, next you must go one step further, and I told you if you found they were bona fide loans that ends it, if you do find that they were not bona fide loans then you must next determine whether or not the defendants knew at the time they were with-

drawing this money that it was not a loan and that they didn't have any intention to pay it at any definite time or anything.

In other words, you should determine whether they knew that, and, as I have told you, that is an essential element. Even though it was false, it must be done willfully, that is, the return must be made willfully and with the specific intent and knowledge at the time they made it that it was in fact a false return.

Now, intent and knowledge is a state of mind. As I have told you, specific intent, as the term used here, means more than the general intent to commit the crime.

To establish the specific intent the Government must prove that these defendants knowingly did the acts, that is, filing these returns, knowing that they were false, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

Intent and motive, however, should never be confused.

Motive is what prompts one person to act or fail to act.

Intent refers only to the state of mind with which the act is done or omitted.

Personal advancement and financial gain are two well-recognized motives for much of human conduct. These laudable motives may prompt one person to voluntary acts of good, another to voluntary acts of crime.

Good motive alone is never a defense where the act done or omitted is a crime. So the motive of the accused is immaterial except insofar as evidence of motive may aid determination of state of mind or intent. [Tr. 1123–1124.]

* * * * *

[F]rom other evidence the Government has shown you that the Virginia Corporation was

the record holder of this property, title holder, that they are the ones who had obtained the loan and that they were the ones who were obligated to pay the interest and the loan, that is the corporation, and from this the Government says, first, there never was any partnership in being.

They don't deny, they admit that these four gentlemen were partners, these three gentlemen and Mr. Ginsberg were partners, they don't question that, under the agreement.

They claim that legally and factually this partnership never came into being due to this situation I have just related, the inability to execute it by transferring the property and designating the nominee and proof of this conveyance.

And, further, the Government says even though it had of [*sic*] been a legitimate transfer of corporate assets to the partnership entity, that it didn't include the losses prior to the creation of the partnership; it could only include losses, if any, that occurred after the partnership came into existence, and, as I say, it never came into existence legally for that reason.

And they claim that these officers, who are the ones—these defendants, who are the ones who put up the Virginia stock as collateral security in escrow, they knew that because they are the ones who put it up, and, therefore, they knew that they couldn't transfer this asset to a partnership, and, therefore, when they couldn't transfer it they couldn't take the benefits of any losses sustained by the partnership in question, and, therefore, they couldn't claim this as a deduction thereby reducing their gross income for the year in question because by so doing they would know that they were filing a false report of their total gross income.

Now, although, again I want to remind you you are not called upon to pass upon the legality of these various alleged transactions pertaining to this, you are the sole judges of the fact as to whether or not that claimed loss was permitted to be taken by the individuals and thereby reducing their reportable gross income for the year in question and whether they knew it. [Tr. 1115–1117.]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1667

UNITED STATES, *Petitioner*

v.

CHARLES J. PILUSO, ET AL., *Respondent*

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1997

UNITED STATES, *Petitioner*

v.

CHARLES J. PILUSO, ET AL., *Respondent*

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Now COMES the Respondent Charles J. Piluso and opposes the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals is found at (Petitioner's App. 1a-5a) and is reported at 528 F.2d 247.

JURISDICTION

Respondent adopts the jurisdictional statements set forth by the Petitioner.

STATUTE INVOLVED

Section 7206(1) of the Internal Revenue Code of 1954, 26 U.S.C. 7206(1), provides:

Any person who—

> (1) * * * Willfully makes and subscribes any return, statement or other document, which contains or is verified by a written declaration that is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter * * *
>
> * * * * *
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution

QUESTIONS PRESENTED

1. Does not the finding of fact of the United States Court of Appeals for the Fourth Circuit that the Respondent is entitled to a new trial because of the failure of the trial judge to instruct the jury in accordance with tendered instructions present a factual determination based on the entire record which is not reviewable in this Court under *National Labor Relations Board* v. *Pittsburg S & S Co.,* 340 U.S. 413 91 Sup. Ct. Rep. 453.

2. Whether, in the special factual situation presented by this record, the Court of Appeals was correct in holding that it was error for the trial judge to remove from the jury's consideration all questions with respect to the Respondent's "good motive" when the Respondent contended that good motive caused him to omit from his gross income and treat as non-taxable the "corporate advances" he had received.

COUNTERSTATEMENT

Respondent incorporates the statement filed by the Petitioner with the following factual additions.

The Respondent was indicted and convicted of three counts which charged a violation of Title 26, Section 7206(1) U.S.C. The indictment charged that the Respondent had filed false tax returns in that he had fraudulently failed to include in his gross income certain funds that were received by him and which he well knew to be taxable. The indictment also charged that with respect to the year 1971 the return was false and fraudulent in that the Respondent claimed a $119,000 partnership loss on his personal tax return which the Government contended was not a valid partnership loss but a corporate loss.

Respondent, Charles J. Piluso, an attorney at law, joined the Pomponio organization in 1965.[1] In 1967 an audit of the Pomponio corporations and their officers by the Internal Revenue Service for the taxable years 1963 and 1964 terminated in a compromise. One of the issues which was disputed and resolved was the taxability or non-taxability of certain corporate advances that had been made during those years by Pomponio-controlled corporations to their corporate officers. The certified public accountant, Burton Bates, who represented the Pomponio inter-

---

[1] The Pomponio organization consisted of over forty corporations which were owned by the Pomponio brothers, Louis, Jr., Peter and Paul.

• "Tr." refers to the transcript of trial proceedings. "R.A." refers to the combined appendix filed in the court of appeals on behalf of all the respondents; "R" refers to the appendix filed on behalf of respondent Piluso.

ests during the audit and who prepared the tax returns for the corporate officers, testified that as a result of the final compromise "the majority of the advances were not taxed as income, the same procedure followed". He testified that following the resolution of this audit the Pomponio corporations followed the same accounting procedure employed in the past with respect to corporate advances to its officers. This policy treated "corporate advances" as loans which were duly recorded as such on the books and records of each corporation that made the advance. Each corporate advance was also reflected by the setting up of an account receivable on the books and records of the corporation making the particular advance. (Tr. 395-396.)

During the subsequent Internal Revenue audit of the Pomponio corporations and their officers, leading up to the indictment in the present case, agents of the Internal Revenue Service discovered in 1971 that the Respondent, Charles J. Piluso, had not in fact signed his 1969, 1970 and 1971 tax returns when they were filed. The agents then presented the tax returns to the Respondent for his signature. His 1969 tax return was signed and subscribed to on March 11, 1971; the 1970 tax return was signed and subscribed to on August 1, 1971; the 1971 tax return was signed and subscribed to on November 10, 1972. At the time Respondent signed these tax returns he was aware of the full-scale audit that was being conducted by the Internal Revenue Service. He was also fully aware that in 1967 the Internal Revenue Service had largely accepted, without penalties, the contention of the Pomponios that the corporate advances were in fact loans to the officers and not taxable income to them.

Bates testified further that as a matter of practice each calendar year he would supply the Respondent with all the necessary financial data for Respondent's accountant to prepare his income tax return. He testified that he never supplied the Respondent with the amount of the corporate advances made in any given year because they were treated as loans to the corporate officers and not as income to them. (Tr. 422.)

Respondent tendered a number of instructions to the trial judge in accordance with his defense that in good faith, to wit that motivated by the Internal Revenue's prior position in the 1967 compromise, he did not include the corporate advances in his gross income for the years in question. These instructions, 2, A, B, C, D, X and Y (Res. App., pp. 2a-6a) were tendered and denied. These instructions placed before the jury in varying ways the legal proposition that Respondent was entitled to an acquittal even if the jury believed the corporate advances for the years in question were in fact income to the Respondent unless they were also satisfied beyond a reasonable doubt that the Respondent did not truly believe the corporate advances were in fact loans to him when he affixed his signature to the tax returns in question. These instructions were denied by the trial judge over the Respondent's objection.

The Court of Appeals reversed the conviction and awarded the Respondent a new trial. It held, inter alia, that the trial judge committed prejudicial error when he failed to instruct the jury in accordance with the substance of instructions tendered by the Respondent relating to his defense of good faith.

The Court of Appeals' opinion also reversed the conviction because of the trial judge's instruction to the jury that they should remove entirely from their consideration the existence of the Respondent's alleged good motive in omitting the corporate advances from his gross income when the jury sought to determine whether the requisite willfulness existed when the returns were signed. This separate basis for reversal has been treated by the Petitioner as Point 1 in its Petition for Certiorari (Pet. for Cert., pp. 8-12). Respondent suggests that it will be unnecessary for the Court to reach and/or decide the correctness of this contention because of the independently-based ground for reversal with respect to the denial of the substance of tendered instructions by the Respondent. Respondent has, therefore, replied to this contention as Point 2 in this brief in opposition to the Petition for Certiorari since the opinion of the Court of Appeals makes resolution of this issue unnecessary.

REASONS FOR DENYING THE WRIT

The Court of Appeals' opinion, which awarded the Respondent a new trial, is independently based on the finding and conclusion of the Court of Appeals that the jury was not properly instructed in accordance with the substance of tendered instructions, which is a non-reviewable issue in this Court.

The Petitioner concedes that the reversal of the conviction by the United States Court of Appeals is independently based on the finding and conclusion of the Court of Appeals from the entire record that the jury was not properly instructed in accordance with the substance of tendered instructions. At page 12 of the Petition for Certiorari the Petitioner states:

> "Although this issue would not independently warrant review by this Court, this aspect of the trial judge's instruction was an independent ground for reversal by the Court of Appeals."

This concession by the Petitioner is supported by this Court's ruling in *National Labor Relations Board* v. *Pittsburg S & S Co., supra.* This Court, under the doctrine in *National Labor Relations Board* v. *Pittsburg S & S Co., supra,* would accept and defer to a finding of fact made by the Court of Appeals based on their conclusions drawn from the entire record. Since this non-reviewable issue separately requires a new trial for the Respondent, Petitioner's asserted error in Point 1 of its Petition, pp. 8-12, dealing with the Court of Appeals' additional separate basis for reversal (because of the removal of good motive from the jury's consideration), need not be reached or resolved by this Court. This Court has often stated that it will not decide contingent or abstract questions in advance of necessiy for its decision. *Thorpe* v. *Housing Authority of the City of Durham,* 393 U.S. 268 89 S.Ct. 518.

Respondent's instructions 2, A, B, C, D, X and Y (Res. App., pp. 2a-6a) were all refused by the trial judge. They were not granted in substance. They sought to place before the jury, in accordance with Respondent's defense, the legal proposition that if Respondent in good faith believed the corporate advances received by him were loans and thus did not include them in his gross income the jury should acquit. They also conveyed to the jury that they should acquit Respondent even if they were satisfied beyond a reasonable doubt that the corporate advances were not

loans but were in fact income if and unless they were satisfied beyond a reasonable doubt that Respondent did not in good faith believe they were loans when he signed the tax returns.

The factual determination and conclusion by the United States Court of Appeals that the trial judge did not in fact substantively charge the jury in accordance with the instructions tendered by the Respondent necessarily involves a consideration of the entire evidentiary record, an evaluation of the instructions tendered and the entire charge of the Court. Th Court of Appeals has resolved this issue in the Respondent's favor in awarding him a new trial. This issue is not reviewable in this Court even if this Court, upon a review of the entire record, were to reach a different conclusion as to whether the trial judge had adequately charged the jury in accordance with Respondent's theory of defense. As this Court stated in *National Labor Relations Board* v. *Pittsburg S & S Co., supra,*

> "*This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way.* It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should '*adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.*' Federal Trade Comm'n.

> v. American Tobacco Co., 274 U.S. 543, 47 S.Ct. 663, 71 L.Ed. 1193."

This Court, in *Federal Trade Commission* v. *American Tobacco Co.,* 274 U.S. 543 47 S.Ct. 663, 71 L.Ed. 1193, stated:

> It now appears to us that this matter of fact is of no general importance. Accordingly, we adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations, and upon that ground alone we affirm the judgment below.

The language of Mr. Justice Frankfurter, dissenting in *Dick* v. *New York Life Insurance Co.,* 359 U.S. 451, 79 S.Ct. 921, is applicable, wherein he stated:

> In order to justify the establishment of the Circuit Courts of Appeals it was necessary to view certiorari as
>
> > 'a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations demands such exercise.'
>
> *Forsyth* v. *City of Hammond,* 166 U.S. 506, 513, 17 S.Ct. 665, 668.

The Petitioner argues that the tendered instructions were in fact substantively given to the jury and cite in support of their argument certain excerpts from the Court's charge (Pet. for Cert. p. 13; Tr.

1123 and 1116-1117). *The Petitioner is precluded from making this argument in this Court because the Court of Appeals has reached an opposite conclusion based on the entire record, the tendered instructions and the entire charge of the Court.* See *National Labor Relations Board* v .*Pittsburg S & S Co., supra,* and *Federal Trade Commission* v. *American Tobacco Co., supra.* This argument also misconceives the substance conveyed in the tendered instructions and avoids the explicit statements of the trial judge throughout the record that he had no intention of instructing the jury in accordance with the tendered instructions. (Tr. 717 and 1084.) The Instruction A (Res. App., p. 3a) requested the Court to instruct the jury that they had to believe beyond a reasonable doubt that the Respondent did not believe in his own mind that the corporate advances were loans when he signed the tax returns before they could convict him. It also calld upon the Court to instruct the jury that in determining Respondent's state of mind on the issue of willfulness they could consider the Respondent's knowledge of the Internal Revenue Service's position adopted in earlier years as to the taxability or nontaxability of the corporate advances to the officers. It also set forth that the jury might consider the family control of the corporations in question, the repayment and/or the intention to repay, and the presence of a certified public accountant in connection with the preparation of personal and corporate returns in determining whether the requisite willfulness existed. None of these concepts was even remotely conveyed by the trial judge to the jury in those portions of the charge cited by the Petitioner (p. 13 Pet. for Cert.; Tr. 1116-1117, 1123). Those excerpts cited by

the Petitioner do not purport to cover these concepts and indeed in tax prosecutions the failure of the trial judge to instruct on the reliance issue when a certified public accountant prepared the tax returns has been held itself to be reversible error. See *United States* v. *Mitchell,* 495 F.2d 185 (4 Cir. 1974); *Bursten* v. *United States,* 395 F.2d 976 (5 Cir. 1968); and *Perez* v. *United States,* 297 F.2d 976 (5 Cir. 1961).

Instructions B and X (Res. App., pp. 3a-5a) conveyed to the jury that the Government was required to establish beyond a reasonable doubt two issues in connection with the instant prosecution: (1) that the corporate advances for the years in question were in fact taxable income to the Respondent, and (2) that the Respondent knew and believed that the said corporate advances were income to him and not loans at the time he signed the returns which were alleged to be false and fraudulent.

Instructions C, D and Y (Res. App., pp. 4a-6a) dealt with the partnership loss claimed on Respondent's 1971 tax return. These instructions all sought to have the Court instruct the jury that in order to convict the Government was required to prove that the partnership loss claimed in 1971 was not a partnership loss but was in fact a corporate loss. They provided further that the Government had to prove beyond a reasonable doubt that the Respondent knew that the $119,000 partnership loss was in fact a corporate loss when he took it as a partnership loss on his 1971 tax return. The three excerpts from the trial judge's charge (Tr. 1116-1117; pp. 13-14 Pet for Cert. relied upon by the Petitioner in covering this issue did not adequately convey the substance of these concepts to the jury.

The Court of Appeals, in making its finding that the jury was inadequately instructed in accordance with tendered instructions reasonably raised by the evidence, had before it the entire charge of the Court and had the benefit of the explicit statements of the trial judge throughout the record that he had no intention of instructing the jury on what the state of mind of the Respondent was as to whether the corporate advances were income or loans if the jury concluded that the corporate advances should have been included in the gross income of the Respondent.

The trial judge's statements on the record make it unmistakably clear that the trial judge had no intention of stating the substance of Respondent's instructions to the jury which Petitioner seeks to attribute to the excerpted paragraphs relied upon in the Petition for Certiorari.

Sample excerpts of the judge's statements on the record reflecting this are as follows:

(Tr. 717)

THE COURT: " * * * The sole question is whether or not these advances, taking into consideration the whole situation, were legitimate bona fide loans if that term is used * * *

MR. AHERN: Whether the defendants believed they were bona fide loans?

THE COURT: Not what they believed

At the conclusion of the charge the trial judge was again specifically requested to instruct the jury in accordance with Instructions X and Y or to convey in similar language that if Respondent believed in fact, though erroneously, that the corporate advances were loans at the time the returns were signed, the

jury should acquit the Respondent. (Tr. 1138; R. 126):

MR. AHERN: I am specifically requesting you to supplement your charge and tell the jury that if they do not find they were bona fide loans but they believe the defendants operated on the premise that they were loans that is enough to acquit the defendants on each charge.

THE COURT: I don't think that is the law. If it is the law they have devised the greatest method of withdrawing funds I ever heard of.

The Court of Appeals, after examining the entire record, has concluded that the jury was not adequately instructed in accordance with Respondent's tendered instructions relating to the alleged good faith belief of the Respondent that the corporate advances were loans at the time he signed the returns.

This Court, therefore, under *National Labor Relations Board* v. *Pittsburg S & S Co., supra,* would defer to the Court of Appeals' finding of fact on this issue and would not disturb it even if on balance, this Court, based on the whole record, would have resolved this determination the other way.

As additional support for the findings and conclusions of the Court of Appeals, the Court of Appeals had before it the entire charge of the trial judge which emasculated to the point of derision the central defense placed before the jury by the Respondent in his instructions, to wit: his good faith belief that the "corporate advances" were loans and thus not includible in his gross income. The total elimination of this defense from jury consideration was accomplished

not only by the tritl judge's denial of tendered instructions, supra, but by the manner in which the jury was instructed. The trial judge employed the following descriptive terms instructing the jury on Respondent's defense of good faith. The records of the Pomponio corporations were described as the "so-called bookkeeping records" (R. 98). When instructing the jury on corporate advances they were described as the "so-called advances" (Tr. 1114 R. 102). When charging the jury with respect to the claimed partnership loss on the 1971 tax return it was referred to as the "so-called loss" (Tr. 1114, R. 102). In dealing with the subject of repayment of the loans, the jury was instructed:

> "And the defendants further brought out and called to your attention the 'so-called repayments' in determining the partnership loss." (Tr. 1119, R. 107)

In describing the partnership loss (there was never any contention by the Government that the partnership was not a valid one) the judge again used the derisive adjective "so-called" when he stated (Tr. 1129; R. 116):

> "Now I told you during my comments above the 'so-called' partnership"

At the conclusion of the charge detailed objections were made to the Court's terminology, its treatment of the defense of good faith, and the denial of the Respondent's instructions. The trial judge did not hesitate to state on the record a total disbelief in the good faith defense of the Respondent. This is reflected

in the following references in the record.[2] The Court of Appeals, therefore, in making its finding that the jury was not properly instructed in accordance with Respondent's theory of defense, has an overwhelming record to support their finding which, under this Court's decision in *National Labor Relations Board* v. *Pittsburg S & S Co.,* is not reviewable in this Court.

The Petition for Writ of Certiorari should accordingly be denied.

The ruling of the United States Court of Appeals for the Fourth Circuit is not in conflict with either *United States* v. *Hawk,* 497 F.2d 365, (C.A. 9), cert. denied, 419 U.S. 838; *United States* v. *McCorkle,* 511 F.2d 482 (C.A. 7) (en banc), cert. denied 423 U.S. 826; and *United States* v. *Pohlman,* 522 F.2d 974 (C.A. 8), (en banc), cert. denied January 12, 1976, No. 75 — 483, and its ruling that good motive may not be removed from a jury's consideration in determining willfulness is in complete harmony with the cases from the Seventh, Eighth and Ninth Circuits and with this Court's ruling in *United States* v. *Bishop,* 412 U.S. 346 (1973).

In *United States* v. *Bishop,* 412 U.S. 346 (1973), which involved a prosecution under 26 USC 7206 (1), this Court determined that the word "willfully" comprises and requires proof of "a voluntary intentional

---

[2] "If it is legal I am the first to congratulate these gentlemen for it." (Tr. 812).

"If you can do that by loan frankly I don't know why I was so stupid during the forty years I was practicing law." (Tr. 714).

"If that is permissible, it is great. We're going to have a revolution." (Tr. 724).

violation of a known legal duty" 412 U.S. at 360 and the "bad faith or evil motive" described in *United States* v. *Murdock,* 290 U.S. 389 (1933) 412 U.S. at 360.

The trial judge correctly defined willfulness to the jury (Tr. 1097; R. 85):

> "The Supreme Court has formulated the requirement of willfulness as used in this identical statute as bad faith or evil intent or evil motive and one of justification in view of all the financial circumstances * * * "

The Court later in the charge told the jury (Tr. 1124; R. 112):

> "Good motive alone is never a defense where the act done or omitted is a crime. So the motive of the accused is immaterial except insofar as the evidence of motive may aid determination of state of mind or intent."

Thus, after having initially told the jury the correct definition of willfulness as defined by this Court in *Bishop* v. *United States,* supra, which required the showing of an evil motive in a 7206(1) prosecution, involving the filing of false tax returns, they were inconsistently told that they should exclude from all consideration the Respondent's good motive *which caused him not to include the corporate advances as a part of his gross income when he signed the returns.*

In the instant case the prosecution under Title 26, Section 7206(1) imposed the duty on the Respondent to sign and subscribe under the penalties of perjury to a truthful tax return. Respondent contended that the prior decision of the Internal Revenue Service in 1967, which accepted the corporate advances as loans

rather than income to the corporate officers, plus the concurrence of the certified public accountant in the treatment of the corporate advances as loans to the officers, operated as the good and motivating reasons, *i.e. the good motive, which caused the Respondent to sign and subscribe to his 1969, 1970 and 1971 tax returns in the middle of a full-scale audit of the Pomponio corporations and their officers.* Therefore, the good motive in this case, which was the asserted belief by the Respondent Piluso that the corporate advances were loans and not includible in his gross income, was directly caused and brought about by the actions of the Internal Revenue Service. The evidence in this case presented a record where *the good motive asserted by Respondent had a direct probative relevance to why the corporate advances were not included as part of the Respondent's gross income,* which was an entirely proper subject for the jury to consider in determining whether the requisite willfulness existed under this Court's ruling in *United States* v. *Murdock,* 290 U.S. 389. The conflict in the Circuits, which the Petitioner seeks to urge in his Petition, does not in fact exist if the present record is scrutinized and the decisions cited by the Petitioner are analyzed on their facts.

United States v. *Hawk, supra,* Ninth Circuit; *United States* v. *McCorkle, supra,* Seventh Circuit; *United States* v. *Pohlman, supra,* Eighth Circuit, simply hold with dissents among the panels that it is not reversible error in a prosecution under Title 26 Section 7203 USC (Failure to File Tax Returns) for the trial judge to refuse to use the words "evil motive and bad purpose" *in defining willfulness so long as other appropriate language conveys the necessary mens rea*

that conveys to the jury the wrongful or bad purpose. In *United States* v. *Hawk, supra,* the Court of Appeals stated:

> Still a nagging question remains as to Justice Blackman's 'evil motive'; was it the unstated intent of the opinion to require inclusion of those exact words? We think not. The statement in the opinion is that willfulness is to be uniformly defined to require the bad purpose or evil motive described in Murdock v. United States, 290 US 389 (1933) * * * the term 'evil motive' is merely a 'convenient short hand expression to distinguish liability based on conscious wrongdoing from liability based on mere carelessness or mistake. Boardman v. United States, 419 F.2d 110 (First Circuit 1969) cert. denied 397 U.S. 991 (1970)

The cases cited by the Petitioner from the Seventh, Eighth and Ninth Circuits simply hold that in a 7603 prosecutions there *is no inflexible requirement for the trial judge to use in hae verba* the phrases "bad purpose" or "evil motive" when defining willfulness. None of these cases remotely suggests that in a 7206(1) prosecution the judge may exclude the good motive of the accused in signing the return *if the good motive has probative relevance to the breach of the known legal duty. United States* v. *Hawk, supra,* is not in conflict with the instant decision. *U.S.* v. *Hawk, supra,* simply holds, in dealing with a prosecution under Title 16, Section 7203 that this Court did not require and/or ascribe any particular "magic" to the words "bad purpose and evil motive" such that a trial judge, under pain of reversible error, must use those very terms when willfulness is defined to the jury.

The scope of all the decisions from the Ninth Circuit relied upon by the Petitioner was clearly defined in *United States* v. *Colacurcio* (9 Cir.), 514 F.2d 1 (1975). The Court of Appeals stated:

> "Contrary to appellant's position, this court and other courts have held that 'magin words' such as 'bad purpose' or 'evil motive' are not necessary as part of the willfulness instruction in cases of this nature. U.S. v. Hawk, 487, F.2d 365 and U.S. v. Divarco, 484, F.2d 670, 674 (Seventh Circuit 1973), cert. denied 415 U.S. 916 94 S.Ct. 1412."

United States v. *Pohlman,* 522 F.2d 974 (C.A. 8), is not in conflict with the instant decision. This case, with dissents among the panel, affirmed a conviction in which the majority ruled that the trial judge had not committed reversible error in instructing the jury on the requirements of willfulness in a prosecution under Title 26, Section 7203 USC. The majority opinion held that the trial judge had sufficiently conveyed to the jury the necessary mens rea or evil intent necessary to sustain a conviction for willfully failing to file a tax return even though the precise words "bad purpose and evil motive" were not used in defining willfulness. The dissenting members of that panel agreed with the majority ruling that this Court's decision in *United States* v. *Bishop, supra,* did not make it mandatory for the trial judge, under pain of reversible error, to use the precise words "bad purpose" or "evil motive" in defining willfulness as long as the concept of the necessary evil mens rea was adequately conveyed to the jury. In a footnote the dissenters did express their concern as to why the majority strained so hard to avoid the very words

that this Court employed in *Murdock* v. *United States,* supra, and *Bishop* v. *United States.*[3]

United States v. *McCorkle,* 511 F.2d 482 (7 Cir.), cert. denied 423 U.S. 826, cited by the Petitioner as in conflict with the instant decision is another prosecution under Section 7203 of Title 26. The Seventh Circuit in that case merely followed the Ninth Circuit in holding that it was not mandatory for a trial judge to use the precise terms "bad purpose" and "evil motive when defining willfulness to the jury.

None of these cases remotely suggests that if an accused's good motive in signing a tax return, which eliminated from his gross income certain items alleged to be taxable, had a probative relevance to the duty allegedly breached, the jury should be told to exclude it from their determination of whether the requisite willfulness exists, as the trial judge did in the instant case.

The Court of Appeals below recognized that in ordinary criminal cases generally the good motive of the accused would be irrelevant except insofar as it had a bearing on intent. The Court of Appeals stated (Pet. Ap. 4A and 5A):

> "Although the instruction was given to explain the difference between intent and motive, and would have been correct in most criminal trials, the Supreme Court indicated in Bishop that the statute at hand requires a finding of a bad purpose or evil motive."

[3] "We fail to understand why the language of the majority opinion strains so hard to avoid use of the very language the Supreme Court approved in Murdock and Bishop. 'Bad purpose and evil motive' to disobey the law is clearly an element of the offense and are words easily phrased and understood."

The Court of Appeals did not hold, as the Petitioner seeks to urge in this Court, that the alleged good motive was a complete defense to the charges. It simply held that in the circumstances of this case the trial judge was in error in telling the jury that in determining whether there was the requisite bad purpose or evil motive necessary to constitute willfulness when the Respondent signed the tax returns they should exclude from all consideration the good motive of the Respondent.

The Court of Appeals correctly pointed out that good motive would ordinarily be irrelevant in most criminal cases. It could be argued that it would be irrelevant even in those tax prosecutions where the known legal duty is simply the duty to file a tax return, as was the case in all the 7603 prosecutions cited by the Petitioner, *United States* v. *Hawk, supra, United States* v. *Pohlman, supra, United States* v. *McCorkle supra.* The Court of Appeals for the Seventh Circuit in *Cullen* v. *United States,* 454 F.2d 386 (1971), after setting out the general rule holding that good motive is irrelevant in most criminal cases,[4] stated:

> "In some situations the defendant's ultimate objective may be an element of the particular offense charged. Thus to prove treason a purpose to give aid and comfort to the enemy must be established, to prove a criminal attempt an analysis of the defendant's purpose beyond the

[4] "His theory is merely another variety of an age-old argument. If a religious, moral or political purpose may exculpate illegal behavior, one might commit bigamy to avoid eternal damnation, steal from the rich to give alms to the poor, burn and destroy, not merely public records but perhaps buildings but even public servants as well to implement a Utopian design. * * * "

> overt act usually completed is necessary and to establish some forms of malice the reasons why the defendant acted as he did may be critical. In such cases the prosecution has the burden of proving improper motive and it would therefore be entirely proper for the defendant to respond with evidence of good motive * * * "

If the good motive contended for has no probative relevance to the known legal duty allegedly breached it should be excluded. Therefore, the Court was correct in excluding good motive in those cases cited in the Petiiton for Certiorari, pp. 11-12, where in 7203 prosecutions one's belief in the immorality of war was excluded, *United States* v. *Malinowski,* 472 F.2d 855 (C.A. 3); and/or one's good motive in protesting the withholding of income taxes from the wages of workmen, *United States* v. *Smith,* 487 F.2d 329 (C.A. 9); and/or one's desire to avoid disclosure of his identity to others, *United States* v. *Matosky,* 421 F.2d 410 (C.A. 7).

The Petitioner has recognized the relevancy of evil motive to prosecutions under 7201, 7206 and 7207 of Title 26 USC in the past. The Government has contrasted the necessity of evil motive under those sections with prosecutions under Section 7203 of Title 26 USC. In the Government's brief filed in the United States Court of Appeals for the Ninth Circuit in *United States* v. *Hawk, supra,* which was decided subsequent to this Court's decision in *United States* v. *Bishop, supra,* the Government contrasted prosecutions under Section 7203 with prosecutions under 7201, 7206(1) and 7207, and with reference to evil motive stated at page 14 of Government's brief:

> "Section 7203 involves willfulness only in conduct of omission and the 'bad' purpose necessary to the offense is simply a purpose 'to evade the law's requirements * * *.' The tax crimes of commission, be they felony or misdemeanor, sections 7201, 7206(1) and 7207, *which require affirmative acts of fraud or attempted evasion of payment of taxes, certainly involved evil motive as a part of such elements* but such term can only mislead the jury in a failure to file a misdemeanor case where bad purpose adequately covers the purposeful failure to do what one knows the law requires one to do."

The 7203 prosecutions cited by the Petitioner do not conflict with the instant decision as set forth above.

CONCLUSION

For the reasons stated above the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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RESPONDENTS APPENDIX

COUNT 11

THE GRAND JURY FURTHER CHARGES:

That on or about the 11th day of March, 1971, in the Eastern District of Virginia, CHARLES J. PILUSO, a resident of McLean, Virginia, did willfully and knowingly make and subscribe a United States Individual Tax Return, Form 1040, for the calendar year of 1969, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported income from wages in the amount of $26,000, dividends in the amount of $1,314.59, interest in the amount of $2,622.92, and fees of $4,700 whereas as he then and there well knew and believed, he received substantial income in addition to that heretofore stated.

Violation of Section 7206(1), Internal Revenue Code, Title 26, United States Code, Section 7206(1).

COUNT 12

THE GRAND JURY FURTHER CHARGES:

That on or about the 1st day of August, 1971, in the Eastern District of Virginia, CHARLES J. PILUSO, a resident of Arlington, Virginia, did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1970, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported income from wages in the amount of $39,850.10, dividends in the amount of $1,570.80, interest in the amount of $1,200.09, legal fees

in the amount of $7,000 and losses from partnerships in the amount of $48,756, whereas, as he then and there well knew and believed, he received substantial income in addition to that heretofore stated.

Violation of Section 7206(1), Internal Revenue Code, Title 26, United States Code, Section 7206(1).

COUNT 13

THE GRAND JURY FURTHER CHARGES:

That on or about the 10th day of November, 1972, in the Eastern District of Virginia, CHARLES J. PILUSO, a resident of Arlington, Virginia, did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1971, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported income from wages in the amount of $50,006.69, dividends in the amount of $1,531.60, interest in the amount of $846.51, gain from sale of capital assets in the amount of $480.65, legal fees in the amount of $6,300 and partnership losses in the amount of $200,580.60, whereas, as he then and there well knew and believed, he received substantial income in addition to that heretofore stated and had less partnership loss than heretofore stated.

Violation of Section 7206(1), Internal Revenue Code, Title 26, United States Code, Section 7206(1).

INSTRUCTION NO. 2

The issue in this case is whether the defendants willfully and knowingly made and subscribed Federal income tax returns for the years 1969, 1970 and 1971, which, at

the time the returns were made and filed, they did not believe to be true and correct as to every material matter in the said returns.

If the defendants believed that the returns were true and correct, and made in good faith, they did not violate the law. The evidence must establish beyond a reasonable doubt that the defendants knowingly and willfully, with an evil motive, filed these returns knowing that they were not true and correct as to every material matter.

26 U.S.C. Section 7206(1) Tendered by Defendants

INSTRUCTION A

The jury is instructed that even if you believe beyond a reasonable doubt that the sums advanced by the corporations should be treated as income rather than advances or loans, as contended for by the defendant, before you could convict the defendant you would have to believe beyond a reasonable doubt that he did not reasonably believe in his own mind that the advances were loans, but were income.

In that connection you are instructed that you may consider the defendant's knowledge or lack of knowledge of the Internal Revenue Service's prior position on the question of advances constituting income or loans, the family control of the corporations, the repayment and/or intention to repay, the presence of a C.P.A. and any other factors bearing on what the defendant's state of mind was when he subscribed to the returns in question.

INSTRUCTION B

The jury is instructed that the defendant contends that in good faith he subscribed his name to each return for the years 1969, 1970 and 1971.

The jury is further instructed that before you could convict the defendant on any of the three charges you

would have to believe beyond a reasonable doubt not only that the sums received by the defendant as advances from the corporations was income, rather than loans or advances, but you would further have to find and believe that the government had established beyond a reasonable doubt that the defendant knew and believed that said advances were income and not loans when he affixed his signature to such return.

If the government failed to establish each of these two elements beyond a reasonable doubt, then it would be your duty to find the defendant not guilty, and if you have a reasonable doubt about this you must give the benefit of the doubt to the defendant and find him not guilty.

INSTRUCTION C

You are instructed that with respect to the calendar year 1971, the government contends that the defendant Piluso took a partnership loss when in fact the loss was that of The Virginia Corporation.

You are instructed that, if the government fails to prove beyond a reasonable doubt that The Virginia Corporation was entitled to the loss, you should go no further and find the defendant not guilty on that count.

If you do find that the government has proved beyond a reasonable doubt that The Virginia Corporation was entitled to the loss, before you could convict the defendant the government must establish beyond a reasonable doubt that the defendant did not have reasonable reason to believe that the partnership was entitled to the loss.

INSTRUCTION D

With respect to the year 1971, the defendant's tax return is in evidence. The return shows that without taking the PHB Associates partnership loss, the defendant's tax liability would not have been affected. You may consider this in determining whether, when the defendant signed the return, he did so with evil motive.

INSTRUCTION X

The jury is instructed that the Government contends that for the years 1969, 1970 and 1971 the defendant Charles Piluso received substantial advances which they contend constituted taxable income.

The defendant Piluso contends that said advances were loans or advances which he intended to repay and which were carried on the books of the corporation as advances or loans.

You are instructed that the Government has a two-fold burden with respect to the proof on each count of the indictment. In that connection, you are instructed that the Government must establish beyond a reasonable doubt not only that the advances admittedly received by the defendant were not loans or advances as contended for by the defendant, but the Government must prove beyond a reasonable doubt that when he subscribed his name to the tax return for each year involved that the defendant Piluso did not in truth and fact believe that these monies were in fact advances or loans, but that on the contrary, he believed they constituted taxable income and subscribed to the return willfully as this court has defined that term to you. If the Government does not establish each of these two elements beyond a reasonable doubt then it would be your duty to find him not guilty, and if you have a reasonable doubt about this, then you must give the benefit of that doubt to the defendant and find him not guilty.

INSTRUCTION Y

The jury is instructed that as to the year 1971 the Government contends that the defendant claimed a partnership

loss in PHB Associates when in fact he was not entitled to said loss.

You are instructed that the burden is on the Government to establish beyond a reasonable doubt not only that the loss was not a properly allowable loss to the partnership, they must establish beyond a reasonable doubt that when the defendant subscribed to the return he did not honestly believe that the partnership was entitled to the loss.

If you find the Government has not satisfied you beyond a reasonable doubt that the Virginia Corporation was entitled to the loss you need go no further and it would be your duty to resolve the partnership loss taken by the defendant in his favor. On the other hand, if you are satisfied beyond a reasonable doubt that the Government has established that the Virginia Corporation was entitled to the loss, and not the partnership (PHB), then before you could convict the defendant, you would have to go still further and you would have to believe beyond a reasonable doubt that when he subscribed his name to the tax return for the year 1971 he did so willfully with bad purpose, knowing that the partnership loss so claimed could not reasonably be taken on his return, and that he did so with bad motive and total absence of justification or belief in the manner in which he treated the partnership loss on his return.

CORRECTED COPY.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1667

UNITED STATES OF AMERICA,

Petitioner,

v.

PETER POMPONIO, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM IN OPPOSITION

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM IN OPPOSITION

On November 14, 1973, the Grand Jury in the Eastern District of Virginia indicted respondents Peter Pomponio and Paul Pomponio, their brother, Louis J. Pomponio, Jr., and respondent Charles J. Piluso, Jr. (*United States* v. *Pomponio, et al.*, 73-304, E.D. Va.) charging them with willfully making and subscribing false tax returns for the years 1969 through 1971 in violation of 26 U.S.C. 7206 (1).

The indictment set forth the same factual situation against each of the defendants. It charged that the defendants had improperly treated amounts paid to them by the Pomponio family corporations as loans rather than dividends, and that they had improperly deducted corporate losses as partnership losses.

Following the severance of Louis J. Pomponio, Jr. by reason of illness,[1] respondents were tried before a jury in March, 1974 (Oren R. Lewis, Jr., Judge).

The case presented sharply contested issues of fact, with the government's principal witness supporting respondents' position that the disputed payments were loans which they intended to repay (Tr. 316 *et seq.*).[2] The trial court excluded evidence showing that respondents had relied upon the Internal Revenue Service's acquiescence in their treatment of similar payments as loans in their tax returns from 1964 through 1966 (Tr. 349 *et seq.*, 611, 612).

The trial court also declined to charge the jury that (i) bad faith or evil motive is an element of the offense and (ii) the jury must acquit if the respondents reasonably believed that they had received loans and incurred losses. (App. 3A).

The Court of Appeals found error in both these refusals and remanded the case for a new trial. "We are of opinion," it said, "that the court's instruction as to motive was incorrect *as used in the case before us*, and . . . it erred in refusing to give a requested instruction on good faith belief of the defendants as to the nature of the loans especially and the deductibility of the partners losses." (App. 3A) (emphasis supplied).

The Court of Appeals found it unnecessary to resolve the other issues raised by respondents. These included, *inter alia*, (1) the failure to conduct a proper voir dire of

[1] Louis J. Pomponio, Jr., upon his recovery, was subsequently tried and acquitted by a jury. (*United States* v. *Pomponio*, 73-304, E.D. Va.)

[2] Tr. refers to the transcript of trial proceedings; Pet. to the petition for certiorari; App. to the opinion of the Court of Appeals attached to the petition; and Pil. Br. to respondent Piluso's opposition to the petition.

the jury to determine and correct the effect of massive publicity directed against respondents immediately prior to the trial;[3] (2) the exclusion of conversations between respondents' representative and the Internal Revenue Service with respect to the respondents' practices of earlier years bearing upon their good faith; (3) the trial judge's excessive and one-sided examination of witnesses and other undue intervention in the trial; and (4) his unfair and inaccurate summary of the evidence.[4]

The immediate question is whether this Court should undertake to determine, at an interlocutory stage of the case, the propriety of jury instructions within the context of a long record, where the government has the opportunity to try the respondents again, undoubtedly before a different trial judge.[5]

[3] This and similar publicity led to the reversal of respondents' convictions in a related stock fraud case tried in January, 1974 before the same judge, *United States* v. *Pomponio*, 517 F.2d 460 (4th Cir. 1975). The same issue is now pending before the Court of Appeals for the Fourth Circuit upon an appeal by Louis J. Pomponio, Jr. from a conviction under 18 U.S.C. 1952 (*United States* v. *Louis J. Pomponio, Jr.*, No. 75-2287), following the reversal by the Court of Appeals of a district court order granting a motion in arrest of judgment. (*United States* v. *Louis J. Pomponio, Jr.*, 511 F.2d 953 (4th Cir. 1975).

[4] Other issues presented to and not decided by the Court of Appeals included the trial court's prejudicial delay in severing a conspiracy count, its admission into evidence of matters possibly relevant to that count but not to the remaining ones, the prejudicial behavior of the United States Attorney's office before the grand jury and related matters.

[5] In at least three cases before the same trial judge arising out of the multi-faceted government attack upon the respondents, their employees and associates, the Court of Appeals reversed convictions for inadequacy of the charge or inadequacy of the voir dire of the petit jury, *United States* v. *Pomponio*, 517 F. 2d 460 (4th Cir. 1975); *United States* v. *Pomponio*, 528 F.2d 247 (4th Cir. 1975 (the instant case), and *United States* v. *Mitchell*, 495 F. 2d 285 (4th Cir. 1974). More recent indictments were assigned to another judge in the Eastern District of Virginia.

Reasons for Denying the Petition

1. There is no conflict between the decision of the Court of Appeals in this case and the decisions of other courts of appeals concerning the need for a jury instruction on "bad purpose or evil motive". The government has cited no appellate court decision in a criminal prosecution under 26 U.S.C. 7206 (1), the statutory provision which concerns us here, in conflict with the decision sought to be reviewed.

(a) Each of the three cases relied upon by the government was a criminal prosecution under a different statute, 26 U.S.C. 7203, for willful failure to file tax returns. *United States* v. *Hawk*, 497 F.2d 365 (9th Cir. 1974) *cert. den.*, 419 U.S. 838; *United States* v. *McCorkle*, 511 F.2d 482 (7th Cir. 1975), *cert. den.*, 423 U.S. 826; *United States* v. *Pohlman*, 522 F.2d 974 (8th Cir. 1975) *cert. den.*, 423 U.S. 1049.

The quantum of proof is much higher in the case of an alleged false return, as in the present case, in violation of 26 U.S.C. 7206, than where the taxpayer has failed to file a return in violation of 26 U.S.C. 7203.[6] The § 7203 cases present no dispute as to the essential fact, non-filing, and the claims of justification are relatively simple. In contrast, the § 7206 cases require a jury determination of deliberate falsity in the content of the returns. In the present case, for example, there are difficult questions as to whether the monies received were loans or income, the nature of the respondents' past practices and their reasonable belief that those practices were lawful in the light, *inter alia*, of the

[6] The government correctly admitted the difference in its brief in the Court of Appeals in *United States* v. *Hawk*, *supra* (see Pil. Br., pp. 22-23). An analogous distinction between two other quite similar tax provisions was noted by Mr. Justice Jackson in *Spies* v. *United States*, 317 U.S. 492, 497-498.

government's past acceptance of those practices.[7] As the Court said in *Spies* v. *United States*, 317 U.S. 492, 498:

> "[w]e would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer."

(b) The good motivation instructions sought by the defendants in the § 7203 cases relied upon by the government were very different from that directed by the Court of Appeals in this case. In *McCorkle* the defendant sought an instruction which would have required evidence of "an intent to defraud" (*supra* at 483); *Hawk* had no claimed factual basis for the instruction he requested except for the defendant's "mental block" (*supra* at 366); *Pohlman* also invoked "personal problems" (*supra* at 976), which made the requested instruction equally baseless. In contrast, the instruction sought here has a rational application to the financial and bookkeeping practices which were the subject of extended testimony.

(c) Even if we were to treat § 7203 cases as presenting problems identical with § 7206 cases, there is no substantial disagreement among the circuits as to the basic requirement of willfulness in instructions. All of the appellate courts follow, with variations of language, this Court's holding in *United States* v. *Bishop*, 412 U.S. 346, 361, that "[U]ntil Congress speaks otherwise, we therefore shall continue to require, in both tax felonies and tax misdemeanors that must be done 'willfully,' the bad purpose or evil motive described in *Murdock, supra.*" (*United States* v. *Murdock*, 290 U.S. 389.) The precise formulation of the

[7] The complex factual situation is reflected in the government's excerpt from the 41-page charge to the jury (App. 10-11A, Tr. 1091-1131).

charge will, of course, vary with the facts and the lower appellate courts have recognized that the differences in formulation may be merely semantic.[8] More important, as Mr. Justice Jackson wrote for this Court, "willful . . . is a word of many meanings, its construction often being influenced by its context". *Spies* v. *United States, supra* at 497. Indeed, the court below limited its criticism of the instruction to the facts of this case saying that the instruction was insufficient "as used in the case before us." (App. 3A).

Accordingly, the case does not present a clear conflict between the decision below and those of the other courts of appeals which would require resolution by this Court. *Avco Corp.* v. *Aero Lodge 735,* 390 U.S. 557, 559.

2. The Court of Appeals in this case correctly read *Bishop* as requiring "a finding of a bad purpose or evil motive" (App. 5A). Contrary to the government's implication (Pet. 11) the Court of Appeals did not employ the term "bad purpose or evil motive" as encompassing matters *dehors* the offense charged. The case is unlike those cases cited by the government arising from political objections to the war, *United States* v. *Malinowski,* 472 F.2d 850

[8] In *United States* v. *Hawk,* 497 F.2d 365, 369 (9th Cir. 1974) *cert. den.* 419 U.S. 838, the Court of Appeals found that "the use of such terms ["as evil motive"] is often helpful" adding that "all that is required are instructions which communicate the proper notion of specific intent in understandable terms" and that "[t]he instructions here were adequate to that purpose." *Ibid.* In *United States* v. *McCorkle,* 511 F.2d 482, 485 (7th Cir. 1975) the court merely held that "bad purpose" and "evil motive" was a "convenient method of referring to the longer definition of 'willfully' . . ." *Id.* at 485. In *United States* v. *Pohlman,* 522 F.2d 974, 977 n. 2 (8th Cir. 1975) *cert. den.* 423 U.S. 1049, the court recognized the possibility of alternative formulations, and, while affirming the judgment of conviction, rewrote the required instruction for future trials.

(3d Cir. 1973) *cert. den.* 411 U.S. 970; from protests against withholding taxes from workingmen's wages, *United States* v. *Smith,* 487 F.2d 329 (9th Cir. 1973) *cert. den.* 416 U.S. 989; or to avoid detection of a fugitive's whereabouts, *United States* v. *Matosky,* 421 F.2d 410 (7th Cir. 1970) *cert. den.* 398 U.S. 904. Instead, the Court of Appeals used the term "evil motive" in this case as did this Court in *Bishop* when it referred to "evil motive and want of justification in view of all the financial circumstances of the taxpayer" (412 U.S. at 360) quoting from *Spies* v. *United States,* 317 U.S. at 498. It was for this reason that the past practices of the respondents and the government's acquiescence in those practices[9] were relevant to show respondents' good faith belief in their description of the monies involved as loans.[10] See *United States* v. *Murdock,* 290 U.S. 389.

There is no occasion here for requesting this Court to repeat in this case what it said about willfulness only four terms ago in *Bishop* and earlier in *Spies* v. *United States, supra,* and even earlier in *United States* v. *Murdock, supra.*

4. An additional reason for denying the petition for certiorari, even if a conflict of circuits had been shown, is that the judgment of reversal is interlocutory from any realistic point of view and as such is not presently entitled to this Court's review. See *American Construction Co.* v. *Jacksonville, T. & K.W. Ry. Co.,* 148 U.S. 372, 384. It is unlikely that a decision by this Court could end this litigation since the Court of Appeals upon remand would

[9] *Potter* v. *United States,* 155 U.S. 438; *Miller* v. *United States,* 120 F.2d 968 (10th Cir. 1941).

[10] The government's acquiescence sought herein to be established (Tr. 349-392, 407, 446, 611-612) would also be the basis for the application of equitable estoppel principles. *United States* v. *Pennsylvania Chem. Corp.,* 411 U.S. 655, 674; *Raley* v. *Ohio,* 360 U.S. 423; *Cox* v. *Louisiana,* 379 U.S. 559.

be required to consider the other substantial issues raised by respondents. On the other hand, if the case is remanded to the district court for retrial, as directed by the Court of Appeals, many of the other issues may be resolved by more adequate instructions and more satisfactory trial procedures before another trial judge.

5. The interlocutory aspect aside, this Court does not sit, except in the most unusual of cases which this does not appear to be, to review upon application of the government a ruling by a Court of Appeals upon a jury instruction in a case remanded for a new trial to the district court. Review of such instructions is peculiarly a function of the lower appellate courts whose normal responsibility is to review trial records. Indeed, this allocation of power to the courts of appeals is reflected in the variations of language used by the district and appellate courts in their respective circuits in the very tax cases relied upon by the government (*supra*, pp. 4, 7).

6. Review should be denied because of the existence of an independent ground for the decision below, which the government concedes is not an appropriate ground for certiorari (Pet. 12). This is the court's alternative reason for reversal, namely, that the trial court had erred in failing to charge the jury as to "good faith belief" (App. 3A). The government's claim that the district court did in fact give such an instruction[11] is not a matter upon which this Court would rule, it being outside the scope of Rule 19(b) of the Rules of this Court.

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[11] This Court is hardly in a position to decide whether the "instruction", as the government suggests (concerning the loan and advances) "was more than sufficient" (Pet. 13) or whether the instructions as to the partnership loss "adequately advised the jury" (*Ibid.*) concerning guilty knowledge, upon a twelve hundred page record and numerous exhibits.

The Court of Appeals must have a wide area of discretion in reviewing such matters as jury instructions in the absence of a conflict between circuits or a significant constitutional issue, particularly where the government's claim must be assessed in the context of a long, detailed and controversial record.[12] This Court does not grant certiorari where there is a non-reviewable alternative ground for the decision below. *The Monrosa* v. *Carbon Black, Inc.*, 359 U.S. 180.

7. Respondents adopt in their entirety the arguments made by the respondent Piluso[13] in his opposition to the petition for certiorari.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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New York, N.Y.

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[12] See *United States* v. *Johnston*, 268 U.S. 220, 227.

[13] We particularly call the Court's attention to the instructions tendered by that respondent, adopted by the Pomponio respondents at the trial and rejected by the trial court (Pil. Br. 2a-6a).